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NO. 07-284

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,

Petitioner

v.

JOHN AUGUST PAULINO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the search of the respondent, which involved an officer putting on plastic gloves and spreading the cheeks of the respondent's buttocks to reveal drugs which were not visible before that time, unreasonable under the Fourth Amendment, when the search was conducted in the parking lot of a car wash in the presence of individuals other than the searching officer?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, John August Paulino, by counsel, Howard Mark Colvin and Allison E. Pierce, Assistant Public Defenders, Office of the Public Defender for the State of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the State of Maryland as there has been no showing that the issue presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

After Mr. Paulino was charged with possession with intent to distribute cocaine and possession of cocaine, he filed a motion to suppress evidence that was recovered during a search incident to his arrest. The Circuit Court for Baltimore County held a hearing on that motion. At that hearing, Detective Elliott Latchaw,

a member of the Baltimore County Police Department, testified as the State's only witness.

On September 29, 2000, a confidential informant told Detective Latchaw that Mr. Paulino would be in the 1100 block of North Point Road with a quantity of crack cocaine on his person. (App.2a)[1]. The informant also told the detective that Mr. Paulino usually hid his drugs in the area of his buttocks. (App.2a).

In response to that information, Detective Latchaw, along with other officers, went to the car wash located in the 1100 block of North Point Road and established surveillance. (App.2a). While there, Detective Latchaw saw a car pull into one of the bays of the car wash. (App.2a-3a). Mr. Paulino was in the passenger seat of that car. (App.3a). Officers then "blocked" the car in, and "a team" removed Mr. Paulino from the vehicle. (App.3a).

Detective Latchaw described what happened next:

> Well, when we - - when Mr. Paulino was removed from the vehicle and laid on the ground, his pants were already pretty much down around his - - below his butt, because I guess that's the fad, these guys like wearing their pants down real low, so it was just a matter of lifting up his shorts, and - - and between his butt cheeks, the drugs were - - I believe one of the detectives actually put on a pair of gloves and just spread his cheeks apart a little bit and it was right there.

(App.5a). The detective was then asked, "So they were not visible before you actually spread his cheeks apart, is that correct?" (App.5a). He responded, "I don't think they were." (App.5a).

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[1] References to "App." are to the appendix that is attached to the Petition for Writ of Certiorari.

The search of Mr. Paulino occurred at night. (App.3a-4a). Detective Latchaw testified that the area was "not at all" busy at that time. (App.3a). He stated that the car wash was "real secluded" and that it was not visible to people walking by the location. (App.4a). According to the detective, however, the area was "well lit." (App.4a). Detective Latchaw confirmed that other officers were present, but he did not recall anyone washing a car. (App.4a).

Mr. Paulino also testified at the suppression hearing, and he offered the following description of the search:

> They had searched me in my pockets, didn't find nothing, and eventually, they came to the subject where - - where in my report, it states the officer said, Mr. Paulino, why is your butt cheeks squeezed? And in further response, I said nothing. He said it again, and another officer came behind with gloves and pulled my pants down and went in my ass. Well, my cheeks. Sorry about that.

(App.6a). According to Mr. Paulino, approximately twelve officers, as well as three of his friends, were present when he was searched. (App.6a).

After the trial court denied Mr. Paulino's motion to suppress and after he was convicted by that court of possession with intent to distribute cocaine, Mr. Paulino appealed to the Maryland Court of Special Appeals. (App.6a, 49a-61a). That Court affirmed his convictions, and Mr. Paulino filed a petition for writ of certiorari, which the Maryland Court of Appeals granted. (App.6a-7a, 49a-58a).

Thereafter, the Court of Appeals held that the search of Mr. Paulino violated the Fourth Amendment, and it reversed the judgment of the intermediate appellate court. (App.9a-26a). The Maryland Court began its analysis by

characterizing the search as a "visual body cavity search." (App.16a). In doing so, it recognized that the police "did not only lift up Paulino's shorts, but also manipulated his buttocks to allow for a better view of his anal cavity." (App.16a). The Court then applied this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) to the facts before it. (App.17a-26a). After recognizing that *Bell* "requires a flexible approach," (App.18a), the Court reviewed the scope of the search, the place and manner of the search, and the justification for initiating it. (App.19a-26a). It ultimately concluded that "the search of Paulino unreasonably infringed on his personal privacy interests when balanced against the legitimate needs of the police to seize the contraband that Paulino carried on his person." (App.26a).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE LOWER COURTS REGARDING THE REASONABLENESS OF STRIP SEARCHES, OR OTHER SEARCHES UNDERNEATH CLOTHING, INCIDENT TO ARREST.

At the outset of its petition, the State implies that the instant case provides this Court with the opportunity to reach an issue which it has not previously considered. Specifically, the State notes that "[t]his Court has not yet addressed . . . whether the authority to conduct a full search incident to an arrest includes the authority to search intimate areas underneath a suspect's clothing, whether by a strip search or a reach-in search." (Petition for Writ of Certiorari at 11). At no point in the proceedings below did Mr. Paulino argue that the authority to conduct a full search incident to an arrest does not include the authority to conduct a strip search or a visual body cavity search. Instead, Mr. Paulino's sole challenge was to the constitutionality of conducting a highly intrusive, physically invasive search in the parking lot of a car wash in the presence of individuals other than the searching officer. Accordingly, this case is not the proper vehicle for this Court to determine "the propriety of conducting a strip search incident to an arrest." (Petition for Writ of Certiorari at 11).

Next, the State argues that because this Court has not addressed the circumstances under which "a strip search or other search of intimate areas underneath a suspect's clothing is reasonable incident to arrest," there is a conflict among lower courts "regarding how to analyze the reasonableness of searches

conducted incident to arrest of a suspect believed to be concealing drugs on his or her person." (Petition for Writ of Certiorari at 9, 10). Although this Court has not addressed strip searches in the specific context of searches incident to arrest, it has provided a framework for the analysis of the constitutionality of strip searches and visual body cavity searches. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The lower courts, moreover, have almost uniformly applied that framework to cases involving strip searches and other invasive searches conducted pursuant to arrests.

In *Bell*, this Court reviewed a prison policy that required all inmates to submit to strip searches and visual body cavity searches after contact visits. *Id.* at 558, 99 S.Ct. at 1884. In addressing the constitutionality of that policy, the Court reiterated that the Fourth Amendment requires that searches be conducted in a reasonable manner. *Id.* The Court then explained,

> The test of reasonableness is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559, 99 S.Ct. at 1884.

The factors enunciated in *Bell* are as applicable to strip searches conducted incident to arrest as they are to strip searches conducted pursuant to prison policies, and the lower courts have consistently recognized that conclusion. *See United States v. Williams*, 477 F.3d 974, 975-77 (8th Cir.) (applying *Bell* factors in

analyzing a "reach-in" search incident to arrest that was conducted in a parking lot), *cert. denied*, No. 07-5250, --- S.Ct. ---, 2007 WL 2005174 (U.S. Oct. 1, 2007); *United States v. Cofield*, 391 F.3d 334, 336-38 (1st Cir. 2004) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted in a hallway of a police station); *United States v. Williams*, 209 F.3d 940, 943-44 (7th Cir. 2000) (applying *Bell* factors in analyzing a "reach-in" search incident to arrest that was conducted on the side of a road); *Amaechi v. West*, 237 F.3d 356, 361-62 (4th Cir. 2001) (applying *Bell* factors in the context of civil rights action against an officer who conducted a strip search incident to arrest in public); *United States v. Ford*, 232 F. Supp. 2d 625, 630-31 (E.D. Va. 2002) (applying *Bell* factors in analyzing a body cavity search incident to arrest that was conducted on the side of a busy highway); *State v. Jenkins*, 842 A.2d 1148, 1157-58 (Conn. App. Ct. 2004) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted on a public street); *Thompson v. State*, 824 N.E.2d 1265, 1267, 1269-71 (Ind. Ct. App. 2005) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted in a motel room); *Commonwealth v. Thomas*, 708 N.E.2d 669, 672-74 (Mass. 1999) (applying *Bell* factors in analyzing a visual body cavity search incident to arrest that was conducted in the corridor of a cellblock); *Commonwealth v. DiCicco*, 2 Mass. L. Rptr. 174, 1994 WL 879762, *2-*4 (Mass. Super. 1994) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted on a sidewalk); *People v. Mitchell*, 768 N.Y.S.2d 204, 206-07 (N.Y. App. Div. 2003) (applying *Bell* factors in analyzing a strip search incident to

arrest that was conducted on a public street); *McGee v. State*, 105 S.W.3d 609, 616-17 (Tex. Crim. App.) (applying *Bell* factors in analyzing a visual body cavity search incident to arrest that was conducted in a secluded area of a fire station), *cert. denied*, 540 U.S. 1004, 124 S.Ct. 536, 157 L.Ed.2d 410 (2003), *rehearing denied*, 540 U.S. 1143, 124 S.Ct. 1133, 157 L.Ed.2d 957 (2004). In fact, the State is forced to admit in its petition that "most courts assessing the reasonableness of a search beneath a suspect's clothing, whether by strip search or reach-in search, rely on the factors set forth by this Court in *Bell v. Wolfish*." (Petition for Writ of Certiorari at 12).

The State also asserts that "[t]here is a substantial conflict among lower courts . . . regarding what constitutes a strip search." (Petition for Writ of Certiorari at 15). This is problematic, according to the State, because "the characterization of a search as a strip search or a reach-in search is important in the assessment of the reasonableness of an on-scene search incident to arrest." (Petition for Writ of Certiorari at 15). Different courts have adopted slightly different definitions of the term "strip search." *See State v. Nieves*, 861 A.2d 62, 70 (Md. 2004) (recognizing that some courts define strip searches as "the removal of the arrestee's clothing for inspection of the under clothes and/or body" while other courts define strip searches to "include a visual inspection of the genital and anal regions of the body"). The lack of complete uniformity, however, is not a significant problem for the simple reason that the label that a court chooses to attach to a particular search does not determine the constitutionality of that search.

Instead, it is the circumstances and details of the actual search that determine its constitutionality. If an officer pulled down an arrestee's pants and visually inspected the arrestee's anal cavity and genitals in a public place before a crowd of people without justification for doing so, the search would likely be held unconstitutional regardless of whether the reviewing court labeled it a strip search, a visual body cavity search, or something else entirely. Similarly, if an officer merely reached into the waistband of the arrestee's pants in a public place to retrieve a weapon that he believed posed a danger and did so without exposing any part of the arrestee's body and after taking steps to ensure that the arrestee was shielded from view, the search would likely be held to be constitutionally reasonable regardless of whether the reviewing court labeled it a strip search, a reach-in search, or something else entirely.

Finally, the State asserts that a conflict exists in the lower courts concerning the weight to be given to the last of the *Bell* factors, the place in which the search was conducted. (Petition for Writ of Certiorari at 17). In the State's view, "[s]everal lower courts, like the Maryland Court of Appeals, have concluded that the test essentially proscribes a search underneath clothing that could possibly be viewed by others, which virtually precludes any such searches at the scene of the arrest." (Petition for Writ of Certiorari at 17). In support of its assertion, the State cites *Thompson v. State*, *supra*, and *People v. Mitchell*, *supra*. (Petition for Writ of Certiorari at 17-18). A review of those cases demonstrates, however, that the State has mischaracterized the impact and reach of their respective holdings.

In *Thompson*, the defendant was arrested in a motel room for "attempting to deal cocaine." *Thompson*, 824 N.E.2d at 1266. After his arrest, officers took the defendant into the bathroom where they conducted a strip search, which involved an officer pulling the defendant's pants down and ordering him to bend over. *Id.* While the defendant's "bare buttocks" were "exposed and raised in the air," *id.* at 1271, a civilian camerawoman filmed what was happening. *Id.* at 1269. During the ensuing search, officers "discovered a package of cocaine in between [the defendant's] buttocks." *Id.* at 1266.

On appeal, the defendant challenged the constitutionality of that search. The Indiana Court of Appeals began its analysis by stating that "[t]he lawfulness of a strip search depends on whether the circumstances reasonably justify such an intrusive invasion of privacy" and by noting the applicability of the *Bell* factors. *Id.* at 1267. The Court then recognized that some of the facts before it, including the fact that the defendant was arrested for a drug felony and the fact that officers had reason to believe that he had drugs on his person, "support[ed] a conclusion that the strip search of Thompson was reasonable." *Id.* at 1268. Ultimately, however, the Court condemned the search, stating,

> Where, as here, the search occurs in a private place and the police are in complete control of the circumstances surrounding the search, we can find no justification for law enforcement to allow a civilian to film or photograph the strip search of a suspect naked below the waist. We conclude that, under these circumstances, the strip search was not only unprofessional but was unreasonable under the Fourth Amendment.

Id. at 1271.

Nothing in the Indiana Court's opinion suggests that it intended to preclude all strip searches at the scene of an arrest as the State posits in its petition. (Petition for Writ of Certiorari at 17). Instead, it is apparent that the Court's holding was driven by the shocking and unique circumstances of the case before it. The fact that the Court rejected a search in which the police ordered a defendant to hold his buttocks in the air after he stripped from the waist down while a civilian camerawoman documented the event is hardly evidence that the Court would reject a less intrusive search that was not filmed. In fact, in an earlier opinion, the same Court upheld a strip search that was conducted in a bedroom of the house where the defendant was arrested. *See Frye v. State*, 757 N.E.2d 684, 687, 689-90 (Ind. Ct. App.), *transfer denied*, 761 N.E.2d 425 (Ind. 2001), *cert. denied*, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002).

Likewise, a review of the New York Court's decision in *Mitchell* demonstrates that its holding is not as broad as the State fears. The defendant in that case was arrested on a city street in the afternoon because the police suspected he was selling drugs. *Mitchell*, 768 N.Y.S.2d at 205. While the arresting officers were waiting for another officer to arrive, they observed the defendant "fidgeting with his hands, which were handcuffed behind his back, moving them towards his buttocks, back, belt and rear pants pockets." *Id.* After a pat down search failed to reveal any contraband, a supervisor ordered a strip search. *Id.* at 205-06.

Officers "took the defendant to the rear of the police van, which was parked on the street, in front of a church." *Id.* at 206. An officer then pulled down the defendant's pants as the defendant bent over with his head inside the van and his body outside the van. *Id.* The officer proceeded to put on plastic gloves and "searched [the defendant's] buttocks area," from which he recovered two "glassines of heroin." *Id.*

On appeal, the New York Appellate Court applied the *Bell* factors and concluded that the search was unreasonable. It explained,

> [W]e have no difficulty in holding that a strip search, conducted in a public place, regardless of whether it includes a search of the arrested person's body cavities, is not justified or reasonable absent the most compelling circumstances that pose potentially serious risks to the arresting officer or others in the vicinity. (accord. Illinois v. Lafayette, 462 U.S. 640, 645, 103 S.Ct. 2605, 77 L.Ed.2d 65 [1983]["the interests supporting a search incident to an arrest would hardly justify disrobing an arrestee on the street"]).
>
> The strip search in this case, conducted as it was on the street, in full view of the public, fails to meet the place or manner component of the *Bell v. Wolfish* inquiry, and, therefore, the glassine envelopes containing cocaine, obtained as a result of this unlawful search, should have been suppressed.

Id. at 206-207. Clearly, the *Mitchell* Court did not proscribe all "search[es] underneath clothing that could possibly be viewed by others." (Petition for Writ of Certiorari at 17). Rather, it proscribed the performance of full-blown strip searches on streets in daylight "in full view of the public" in the absence of a "compelling" reason to justify such actions.

People v. Butler, 813 N.Y.S.2d 366 (N.Y. App.), *leave to appeal dismissed by* 817 N.Y.S.2d 628 (N.Y. 2006), a subsequent decision by the same court, supports the conclusion that *Mitchell* is a narrow holding, limited to a very specific set of facts. In *Butler*, as in *Mitchell*, the defendant was arrested on the street for violations of the State's drug laws. *Butler*, 813 N.Y.S.2d at 367. When the arresting officer performed a pat down search, he felt "'a large rocky substance' in the defendant's upper buttocks." *Id.* Then, the officer "loosened and lowered" the defendant's pants and underwear "for a brief time and to a minimal degree in order to retrieve the glassine bag of cocaine . . .." *Id.* at 369. That bag either "sat atop [the] defendant's buttocks" or was "partly wedged in between," and the officer was able to retrieve it without putting on gloves. *Id.*

The trial court suppressed the drugs that were recovered, ruling that the strip search was impermissible. *Id.* at 368. The appellate court, however, reversed. *Id.* After that court rejected some of the trial court's factual findings, it simply held that a strip search had not occurred and that the case was "readily distinguishable" from *Mitchell*. *Id.*

The State also suggests that the Maryland Court of Appeals' opinion "essentially proscribes a search underneath clothing that could possibly be viewed by others . . .." (Petition for Writ of Certiorari at 17). Once again, a careful reading of the opinion demonstrates that the State is mistaken. Although the Maryland Court did take into account the fact that members of the public were present when Mr. Paulino was searched, (App.25a), it did not hold the search

unconstitutional simply because those persons may have seen the search. Indeed, the Court relied on a myriad of other factors in reaching its decision, including the fact that the search was "highly intrusive and demeaning" and involved the manipulation of Mr. Paulino's body, as well as the exposure of his buttocks; the fact that the search took place in well-lit car wash; the fact that the officers made no effort to shield Mr. Paulino from the view of the people present at the scene; and the fact that there was no evidence that Mr. Paulino possessed a weapon or was attempting to destroy evidence. (App.19a, 22a-25a). If any one of those facts had been different, the Court very well might have reached a different conclusion.

In summary, there is simply no conflict that needs to be resolved by this Court. When faced with determining the constitutionality of reach-in searches, strip searches and visual body cavity searches conducted incident to arrests in public settings, the lower courts have routinely applied the factors and test enunciated by this Court in *Bell v. Wolfish*. The courts have done so, moreover, in a remarkably consistent manner, condemning only the most egregious searches, thereby giving officers the leeway they need to protect themselves and to prevent the destruction of evidence.

II. THE MARYLAND COURT OF APPEALS PROPERLY WEIGHED THE FACTORS ENUNCIATED BY THIS COURT IN *BELL V. WOLFISH* AND CORRECTLY CONCLUDED THAT THE SEARCH OF THE RESPONDENT, WHICH IT CHARACTERIZED AS A VISUAL BODY CAVITY SEARCH, WAS UNREASONABLE UNDER THE FOURTH AMENDMENT, WHEN THE SEARCH WAS CONDUCTED IN A PUBLIC PLACE IN THE VIEW OF OTHERS.

The State argues that the Maryland Court of Appeals misapplied the balancing test enunciated in *Bell v. Wolfish*. (Petition for Writ of Certiorari at 20-25). In its view, the Court of Appeals "improperly assessed the scope and manner of the intrusion" and "placed too much weight on the fact that the search occurred in a public place." (Petition for Writ of Certiorari at 21). The State also contends that the Court erroneously stressed a lack of exigency. (Petition for Writ of Certiorari at 21).

As an initial matter, the State's argument rests on mischaracterizations of the evidence adduced at the suppression hearing. First, the State inaccurately describes the search of Mr. Paulino, claiming that "the officer simply reached in and retrieved the drugs" and stating that "Paulino's pants were kept in place during the search." (Petition for Writ of Certiorari at 20, 24). In reality, the search began with someone "lifting up [Mr. Paulino's] shorts" and continued with the searching officer "put[ting] on a pair of gloves" and actually "spread[ing] [Mr. Paulino's] cheeks apart a little bit." (App.5a). As the Maryland Court of Appeals explained, "It appears that the police officers attempted to manipulate Paulino's

clothing in such a manner that his buttocks could be more readily viewed. In this instance, the police did not only lift up Paulino's shorts, but also the officers manipulated his buttocks to allow for a better view of his anal cavity." (App.16a).

The State continues its mischaracterization by stating that the search took place "in a bay of a deserted car wash . . .." (Petition for Writ of Certiorari at 24). Although the detective testified that the car in which Mr. Paulino was a passenger pulled into one of the bays when it arrived at the car wash, (App.3a), the detective never testified that the search took place in that bay. Instead, he simply testified that Mr. Paulino "was removed" from the car and was "laid on the ground," where he was then searched. (App.5a). There is, therefore, no support in the record for the State's conclusion that the search itself occurred inside a bay of the car wash.

Finally, the State erroneously contends that "there is absolutely no evidence that anyone other than the searching officer saw Paulino's buttocks." (Petition for Writ of Certiorari at 23). Although neither Detective Latchaw nor Mr. Paulino specifically testified that anyone saw Mr. Paulino's buttocks, the officer confirmed that a "team" of officers participated in the arrest and confirmed that Mr. Paulino arrived at the car wash with other individuals. (App.3a). In light of those facts, the Court of Appeals soundly rejected the notion that "no one other than the searching officer saw Paulino's buttocks," stating,

> Detective Latchaw's testimony at the suppression hearing simply does not support this contention. To the contrary, it is entirely conceivable that the search of Paulino was visible to any of the persons present at the scene of the arrest. There is

> no dispute that three of Paulino's associates were present as well as a team of Baltimore County police officers. Moreover, Detective Latchaw did not testify that the searching officer took any precautions to shield Paulino's body, particularly the obviously exposed part of his buttocks, from public view.

(App.25a, n.7).

In addition to resting on factual inaccuracies, the State's argument is also wrong on its merits. The State first takes issue with the fact that the Court of Appeals took into account a lack of exigency when it considered Mr. Paulino's search. According to the State, exigency "is not a factor in the standard of reasonableness pronounced by this Court in *Bell*." (Petition for Writ of Certiorari at 21). It is true that this Court did not explicitly mention exigency as a factor in *Bell*. That failure, however, does not render the Court of Appeals' consideration of exigency error. Exigency, or the lack thereof, is certainly relevant to a determination of whether the police had justification for initiating the search, which is one of the enunciated *Bell* factors. *Bell*, 441 U.S. at 559, 99 S.Ct. at 1884.

In the instant case, the informant who provided Detective Latchaw with information told the detective where Mr. Paulino usually concealed his drugs. (App.2a). The police, therefore, were justified in conducting a reasonable strip search of Mr. Paulino at some point in time. There was absolutely no evidence adduced at the suppression hearing, however, that Mr. Paulino had a weapon. Nor was any evidence presented that Mr. Paulino was attempting to destroy the evidence that he possessed. As such, there was no exigency, or justification, for

conducting an immediate visual body cavity search in the parking lot of a car wash in the presence of members of the public, and the Court of Appeals was correct to take that into consideration in determining whether the search of Mr. Paulino was constitutional.

The State next quarrels with the fact that the Court of Appeals characterized Mr. Paulino's search as a strip search and visual body cavity search. (Petition for Writ of Certiorari at 21). As noted *supra*, Detective Latchaw testified that the search began with someone "lifting up [Mr. Paulino's] shorts" and continued with the searching officer "put[ting] on a pair of gloves" and actually "spread[ing] [Mr. Paulino's] cheeks apart a little bit" to reveal drugs that were not visible before that point in time. (App.5a). After taking into account the fact that the officers adjusted "Paulino's clothing in such a manner that his buttocks could be more readily viewed" and the fact that the officers "spread the cheeks of Paulino's buttocks to inspect his anal cavity," the Court concluded that the search "amounted to a visual body cavity search." (App.16a). In light of the circumstances of this case, the Court's characterization was a fair and accurate one.

In fact, the Maryland Court is not alone in characterizing the type of search that occurred in the instant case as a visual body cavity search. In *McGee v. State*, *supra*, officers forced the defendant to "drop his pants, bend over, and spread his buttocks." *McGee*, 105 S.W.3d at 613. When the defendant did so, the searching officer "saw several rocks of crack cocaine wrapped in red plastic in plain view

lodged between McGee's buttocks." *Id.* The officer explained that the drugs were not inside the defendant's anus and that he was able to retrieve the drugs "without digitally probing the anus." *Id.* Throughout the course of its opinion, the Texas Court referred to the search as a visual body cavity search. *Id.* at 616-18.

Moreover, the Maryland Court of Appeal's analysis of this prong of the *Bell* test demonstrates how fact-driven the analysis is. While analyzing the scope of the intrusion, the Court specifically noted that under a slightly different set of facts, it might reach a different conclusion, stating, "If, in the case *sub judice*, the drugs were protruding from between the cheeks of Paulino's buttocks and visible without spreading his buttocks cheeks, the classification of the type of search would be a close one." (App.16a). The Court's recognition that the change of one small fact could alter its conclusion simply demonstrates that the impact of this case on future litigants is not likely to be great, thereby making it a poor candidate for this Court's review.

Finally, the State suggests that the Court of Appeals "established a *per se* rule that on-scene strip searches incident to an arrest must be conducted in an enclosed area . . .." (Petition for Writ of Certiorari at 21). The Court, however, did no such thing. In analyzing the last of the *Bell* factors, the place in which the search was conducted, the Maryland Court found that this prong weighed against the constitutionality of the search for numerous reasons. First, the Court recognized that the police conducted an intrusive search in a "well-lit" public car wash. (App.22a-23a, 25a). Next, the Court recognized that members of the public

were present while the search was conducted. (App.24a, 25a). Finally, the Court noted that there was "no indication in the record . . . that the police made any attempt to limit the public's access to the car wash or took any similar precaution that would limit the ability of the public or any casual observer from viewing the search of Paulino . . .." (App.23a). Although the Court did suggest that the police could have searched Mr. Paulino in the confines of his car or a police vehicle, (App.25a-26a), the Court was simply noting that the police had multiple reasonable alternatives available to them, and it was in no way suggesting that the simple failure to use those alternatives was what rendered the search unconstitutional.

As the foregoing review of the Maryland Court of Appeals' opinion demonstrates, it is apparent that the Court recognized that its job was to assess the reasonableness of Mr. Paulino's search, by taking into account the *Bell* factors and by balancing the need for the search against the invasion of personal rights that it entailed. It is also apparent that the Court of Appeals actually undertook that balancing test and, in doing so, that it appropriately weighed each relevant factor. The State is simply aggrieved by the fact that, in the end, the scales did not tip in its favor. That is not a reason, however, for this Court to grant the State's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Mr. Paulino respectfully requests that this Court

deny the Petition for Writ of Certiorari.

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